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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SCOTT WELK, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Plaintiffs,

v.

BEAM SUNTORY IMPORT CO. and
JIM BEAM BRANDS CO.,

Defendants.

Case No. 3:15-cv-0328 LAB JMA
Pleading Type: Class Action

**DEFENDANT JIM BEAM BRANDS
CO.'S MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF ITS MOTION TO DISMISS
COMPLAINT**

Hearing Date: May 4, 2015
Time: 11:15 a.m.
Courtroom: Courtroom 14A
(14th Floor - Annex)
Judge: Hon. Larry A. Burns

Complaint Filed: February 17, 2015

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff presents a first-of-its-kind labeling claim: that a 1/16” high, 12-letter word (“handcrafted”) on the *side* of a bourbon bottle—not even visible to consumers unless they pull the bottle off the shelf and turn it—fraudulently induced consumers to buy Jim Beam white label bourbon. Plaintiff claims that because this word induced the “thousands, if not millions” of Class purchases: (1) all purchasers should get their money back; (2) Defendant should fund a corrective advertising campaign (with “written notice to the public”); and (3) Plaintiff’s counsel should receive an award of “[r]easonable attorneys’ fees.” Compl. ¶¶ 23, 64, Prayer for Relief. As demonstrated below, Plaintiff’s theory is factually and legally untenable.

Plaintiff’s unprecedented allegations, founded solely on small print on a side label, defy common sense and stretch the bounds of California’s “reasonable consumer” test beyond recognition. Plaintiff also ignores that as an alcoholic beverage, the Jim Beam label is pre-approved by a federal agency, resulting in a “safe harbor” from consumer fraud claims under California state law. Thus, even if Plaintiff could plausibly allege deception of “reasonable consumers,” which plainly he cannot, his claims would be barred.

Respectfully, all of Plaintiff’s claims should be dismissed, and without leave to amend.

II. STATEMENT OF ALLEGED FACTS

Jim Beam Brands Co. (“Jim Beam”) manufactures, markets and sells bourbon whisky products. *See* Compl. ¶¶ 2, 11, 12. On February 17, 2015, Plaintiff Scott Welk filed his Complaint, purportedly on behalf of all California consumers who purchased Jim Beam white label bourbon (“Jim Beam bourbon”) from February 18, 2011, through February 17, 2015. *Id.* ¶¶ 126-27. The Complaint purports to state claims under California state law: violations of the Unfair Competition Law (“UCL”) and the False Advertising Law (“FAL”), as well as claims for intentional

1 misrepresentation and negligent misrepresentation. Although Plaintiff named both
2 Jim Beam Brands Co. and “Beam Suntory Import Co.” as Defendants, the entity
3 “Beam Suntory Import Company” does not exist and is therefore not a proper
4 defendant in this matter.

5 Plaintiff alleges that he purchased a 1.75 liter bottle of Jim Beam bourbon on
6 December 12, 2013, at an unidentified “local liquor store” in San Diego. *Id.* ¶¶ 30,
7 34. According to his Complaint, he purchased the bourbon because it bore the
8 statement “handcrafted” on its label, and this allegedly led him to believe the bourbon
9 “was of superior quality” for which he was willing to spend comparatively more than
10 he would for a lesser quality comparative product. *Id.* ¶¶ 35, 64.

11 Plaintiff repeatedly alleges the “handcrafted” statement appears “prominently”
12 and in “large font” on the label. *Id.* ¶¶ 18, 21, 33. This is so patently untrue that the
13 Complaint resorts to enlarging and distorting the appearance of the “handcrafted”
14 statement on the label. As compared to the actual label (*see* Exhibit A to Request for
15 Judicial Notice¹), Plaintiff apparently created a blown-up version (¶ 33) by first
16 photographing the label (it is slanted and has a glare), then – based on the fuzzy
17 appearance – must have zoomed in on the image and stretched it horizontally to
18 amplify its appearance. The photo of the actual label (¶ 32 as to the front and right
19 side panels, and in full in Exhibit A to Request for Judicial Notice) demonstrates that
20 the word appears once, in small print (only 1/16” high on the 1.75 liter bottle and only
21 1 millimeter high on the 750 milliliter bottle), and only on one of the *sides* of the
22 label. Indeed, the “handcrafted” statement appears only as part of an artistic graphic
23

24 ¹ The label from the Jim Beam bourbon is attached as Exhibit A to Jim Beam’s
25 Request for Judicial Notice, filed contemporaneously with this motion. Courts may
26 consider additional documents where “the plaintiff’s claim depends on the contents of
27 a document, the defendant attaches the document to its motion to dismiss, and the
28 parties do not dispute the authenticity of the document, even though the plaintiff does
not explicitly allege the contents of that document in the complaint.” *Kniesel v.*
ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005).

1 design above (and in the same font as) the words “family recipe” and “since 1795,”
2 with a whisky barrel appearing in between the words. *Id.* The label itself shows that
3 the challenged “handcrafted” statement is not – under any definition of the word –
4 “prominent” on the Jim Beam bourbon label.² Plaintiff does not allege, nor can he,
5 that the challenged statement appears anywhere on the front of the label, or even on
6 the second side label, for that matter. (*See* Exhibit A to Request for Judicial Notice.)

7 Plaintiff alleges he was misled because Jim Beam’s production process involves
8 “little to no human supervision, assistance or involvement.” *Id.* ¶ 36. He further
9 alleges that photos, diagrams and video footage “taken directly from [Jim Beam’s]
10 website” demonstrate in detail the “mechanized and/or automated” process used to
11 produce the bourbon. *See, e.g., id.* ¶¶ 15, 16, 38-63. Plaintiff argues it was false or
12 misleading for Jim Beam to describe its bourbon made by this process as
13 “handcrafted,” relying on the definition provided in the Merriam-Webster dictionary
14 (i.e., “created by a hand process rather than by a machine”). *Id.* ¶ 70. Plaintiff does
15 not allege that he suffered any personal injury or property damage as a result of his
16 purchase of the Jim Beam bourbon, only that he either would not have purchased the
17 bourbon—or would have paid less for it—had he known that it “was not
18 ‘Handcrafted.’” *Id.* ¶ 22.

19 **III. STANDARD OF REVIEW**

20 Under Federal Rule of Civil Procedure (“Rule”) 12(b)(6), a court may dismiss a
21 complaint for “failure to state a claim upon which relief can be granted.” Fed. R. Civ.
22 P. 12(b)(6). A complaint fails to state a claim under Rule 12(b)(6) unless it contains
23 “enough facts to state a claim for relief that is plausible on its face.” *Bell Atl. v.*

24
25 ² The Court should ignore Plaintiff’s allegations that the challenged statement is
26 “prominent” or written in “large font.” *See Sumner Peck Ranch v. Bureau of*
27 *Reclamation*, 823 F. Supp. 715, 720 (E.D. Cal. 1993) (citing *Durning v. First Boston*
28 *Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987)) (“the court may disregard allegations in
the complaint if contradicted by facts established by exhibits attached to the
complaint”).

1 *Twombly*, 550 U.S. 544, 547 (2007). The court should not accept unreasonable
2 inferences or unwarranted deductions of fact. *Ashcroft v. Iqbal*, 556 U.S. 662, 678
3 (2009) (noting that “[t]hreadbare recitals of the elements of a cause of action,
4 supported by mere conclusory statements, do not suffice”). In other words, a
5 complaint must allege “more than labels and conclusions” or a “formulaic recitation of
6 the elements of a cause of action.” *Twombly*, 550 U.S. at 555. Rather, the factual
7 allegations “must be enough to raise a right to relief above the speculative level.” *Id.*
8 Where, as here, the complaint contains unsupported factual allegations and
9 implausible theories of relief, Rule 12(b)(6) requires that the complaint be dismissed.
10 *Id.* at 547.

11 Although a motion to dismiss may be granted with leave to amend, leave to
12 amend is not required where “any amendment would be futile.” *See Leadsinger, Inc.*
13 *v. BMG Music Publ’g*, 429 F. Supp. 2d 1190, 1197 (C.D. Cal. 2005); *Miller v. Rykoff-*
14 *Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988) (citation omitted) (futility means that
15 “no set of facts can be proved under the amendment to the pleadings that would
16 constitute a valid and sufficient claim or defense”).

17 **IV. ARGUMENT**

18 **A. Plaintiff’s Claims Fail Because the Challenged Label is Affirmatively** 19 **Authorized Under State and Federal Law**

20 Plaintiff claims that Jim Beam’s use of the statement “handcrafted” on its
21 bourbon label violates California state law. But it is well established that Jim Beam’s
22 compliance with federal law and regulations insulates it from Plaintiff’s claims. *Cel-*
23 *Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 182 (1999);
24 *see also Alvarez v. Chevron Corp.*, 656 F.3d 925, 934 (9th Cir. 2011) (applying the
25 *Cel-Tech* safe harbor to a UCL claim and applying a similar safe harbor to the
26 Consumers Legal Remedies Act (“CLRA”) claims). As the California Supreme Court
27 has held, California’s safe harbor doctrine applies with extra force in the context of
28 consumer protection laws:

1
2 “Although the unfair competition law’s scope is
3 sweeping, it is not unlimited. ... If the Legislature has
4 permitted certain conduct or considered a situation and
5 concluded no action should lie, courts may not override
6 that determination. When specific legislation provides a
7 ‘safe harbor,’ plaintiffs may not use the general unfair
8 competition law to assault that harbor.”

9 *Cel-Tech*, 20 Cal. 4th at 182. Thus, where a defendant “comple[is] with the relevant
10 [federal] regulations,” its conduct is not subject to UCL or FAL claims. *Pom*
11 *Wonderful LLC v. Coca Cola Co.*, Case No. CV 08-06237 SJO (FMOx), 2013 WL
12 543361, at *5 (C.D. Cal. April 16, 2013) (finding that the safe harbor doctrine
13 provided a separate and independent basis for dismissing UCL and FAL claims); *see*
14 *also Ebner v. Fresh Inc.*, Case No. SACV 13-00477 JVS, 2013 WL 9760035, at *6
15 (C.D. Cal. Sept. 11, 2013) (finding that compliance with FDA labeling regulations
16 insulated cosmetic manufacturer from UCL and FAL liability under California safe
17 harbor doctrine); *Davis v. HSBC Bank Nev.*, 691 F.3d 1152, 1165–66 (9th Cir. 2012)
18 (affirming dismissal of UCL claim based on safe harbor provided by federal
19 regulations).

20 Plaintiff nevertheless seeks to hold Jim Beam liable under state law for doing
21 precisely what the federal government has permitted. But because Plaintiff cannot
22 “assault th[e] harbor” of federal regulations through the guise of California consumer
23 protection claims, all of his claims must fail. *Cel-Tech*, 20 Cal. 4th at 182. In
24 particular, the TTB is the federal agency charged with promulgating regulations
25 regarding the labeling of distilled spirits, wines, and malt beverages pursuant to the
26 FAAA. The TTB also enforces FAAA regulations regarding the labeling of distilled
27 spirits, including 27 U.S.C. § 205(e)’s prohibition of false and misleading statements.
28 *See* http://www.ttb.gov/main_pages/memo-understanding.shtml; http://www.ttb.gov/about/stat_auth.shtml; 27 U.S.C. § 205(e); 27 C.F.R. § 5.42(1). To ensure a distilled

1 spirit label “complies with applicable laws and regulations,” the TTB reviews and
2 approves distilled spirit labels prior to the products’ distribution or sale. *See* 27
3 C.F.R. § 13.1, 13.21. This review includes the mandate in Section 27 U.S.C. § 205(e)
4 that the label not be false or misleading: “[e]xamples of advertising areas that TTB
5 will review include ... [s]tatements that are false, misleading, or deceptive....” *See*
6 http://www.ttb.gov/consumer/labeling_advertising.shtml); *see also* 27 U.S.C. § 205;
7 27 C.F.R. § 5.65(a).

8 When a federal agency reviews and pre-approves labels for regulatory
9 compliance, courts across the country have consistently applied state law safe harbor
10 provisions. While the California Supreme Court has expressly recognized such a safe
11 harbor for California, the California courts have not yet had occasion to apply it in this
12 scenario. *Cel-Tech*, 20 Cal. 4th at 182-185. The repeated application in other
13 jurisdictions, including one applying California law, however, demonstrates that
14 application here fits squarely within the *Cel-Tech* rationale. *See In re Celexa &*
15 *Lexapro Mktg. & Sales Practices Litig.*, No. 13–11343–NMG, 2014 WL 866571, at
16 *3 (D. Mass. Mar. 5, 2014) (applying California law) (UCL and FAL claims based on
17 allegations that prescription drug label was “misleading and inadequate” barred as a
18 matter of law by the California safe harbor provision where drug labels are subject to
19 FDA’s preapproval process). For instance, in *Kuenzig v. Hormel Foods Corp.*, 505 F.
20 App’x 937 (11th Cir. 2013) (*per curiam*), the Eleventh Circuit affirmed the district
21 court’s dismissal of the plaintiff’s “putative class-action complaint alleging that [the
22 defendant] misled consumers into believing its lunch meat products contained fewer
23 fat-calories than they actually did.” *Id.* at 938-39. In affirming, the court reasoned
24 that the “[t]he labels complied with federal regulations regarding the use of percentage
25 fat-free claims and **were approved by [the appropriate federal agency] prior to their**
26 **commercial use.**” *Id.* (emphasis added). For these reasons, the court held that the
27 defendants “could not be liable pursuant to [Florida]’s safe harbor provision.”
28 *Id.* Other courts have done the same. *See Prohlias v. Pfizer, Inc.*, 490 F. Supp. 2d

1 1228, 1234 (S.D. Fla. 2007) (applying safe harbor where “the FDA approved the
2 prescription drug ... to reduce the risk of heart attacks ...,” the drug’s “FDA approved
3 label specifically include[d] this indication,” and “[a]ccordingly, any advertisements
4 that stated or implied that [the drug] reduced the risk of heart disease or heart attacks
5 simply marketed an approved use of the drug”); *DePriest v. AstraZeneca Pharms.*,
6 *L.P.*, 351 S.W.3d 173-78 (Ark. 2009) (applying safe harbor where the “FDA is vested
7 with the authority to approve labeling for any new drug,” “the FDA regulates
8 prescription drug advertising,” the FDA specifically approved the labeling for the
9 prescription drug at issue, thus determining “that the information is not false or
10 misleading,” and the defendant’s “advertising for [the drug] is supported by FDA-
11 approved labeling”).

12 As described above, the TTB’s process here includes a review to ensure labels
13 do not contain “[a]ny statement that is false or untrue in any material particular, or
14 that, irrespective of falsity, directly, or by ambiguity, omission, or inference, or by the
15 addition of irrelevant, scientific or technical matter tends to create a misleading
16 impression.” 27 C.F.R. § 5.65; 27 C.F.R. § 13.1, *et seq.* It is thus nearly identical to
17 the pre-approval processes in *Kuenzig* (where the USDA reviewed meat and poultry
18 products for compliance with the Federal Meat Inspection Act’s similar regulations)
19 and in cases where prescription drug labels and medical devices are also expressly
20 pre-approved. *See, e.g., Barnes v. Campbell Soup Co.*, 2013 WL 5530017, at *5
21 (N.D. Cal. 2013) (precluding state law claims where the USDA and Food Safety and
22 Inspection Service “previously approved of Defendant’s ... [label], [the label] cannot
23 be construed, as a matter of law, as false or misleading”); *Meaunrit v. ConAgra Foods*
24 *Inc.*, 2010 WL 2867393, at *7 (N.D. Cal. 2010) (dismissing state causes of action
25 “[b]ecause the pre-approval process [under the FMIA] includes a determination of
26 whether the labeling is false and misleading, and the gravamen of plaintiff’s attack on
27 the label concerns whether those instructions are accurate”); *Trazo v. Nestle USA, Inc.*,
28 2013 WL 4083218, at *7 (N.D. Cal. Aug. 9, 2013) (claims against Nestle’s Lean

Pockets and Hot Pockets dismissed because “meat products are pre-approved by the USDA, which first reviews the labels, considers whether they are false or misleading, and approves them. The Hot Pockets and Lean Pockets in question have the USDA-approved sticker on the label, indicating that they have gone through the process”); *Reigal v. Medtronic, Inc.*, 552 U.S. 312, 321 (2008) (plaintiff’s state law claims barred because the FDA provided pre-approval of the pharmaceutical label in dispute); *In re Medtronic, Inc., Sprint Fidelis Leads Prods. Liab. Litig.*, 623 F.3d 1200, 1203 (8th Cir. 2010) (same); *Perez v. Nidek Co.*, 711 F.3d 1109, 1118 (9th Cir. 2013) (affirming dismissal of common-law claims challenging the safety and effectiveness of a medical device that had received premarket approval from the FDA). The same result is appropriate here, and all of Plaintiff’s claims, as they arise under state law, should therefore be dismissed under California’s safe harbor doctrine. *Cel-Tech*, 20 Cal. 4th at 182.

B. Even if Plaintiff’s Claims Were Not Barred by the Safe Harbor Doctrine, They Should be Dismissed

1. Plaintiff Has Not Plausibly Alleged a Likelihood of Deception

Plaintiff’s claims for false advertising under the FAL and UCL must be dismissed because he has not and cannot plead that the challenged label is likely to mislead a reasonable consumer. *See Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995); *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 506-07 (2003) (reasonable consumer standard applies to UCL false advertising claims); *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1360 (2003) (same with respect to FAL advertising claims). To state a claim under the FAL and UCL, a plaintiff must plausibly plead that “members of the public are likely to be deceived” by the alleged false advertising statement. *Brod v. Sioux Honey Ass’n Coop.*, 927 F. Supp. 2d 811, 828 (N.D. Cal. 2013) (citing *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995)). Notably, “‘likely to deceive’ implies more than a mere possibility

1 that the advertisement might conceivably be misunderstood by some few consumers
2 viewing it in an unreasonable manner.” *Lavie*, 105 Cal. App. 4th at 508. Instead,
3 “likely to deceive” indicates that “it is probable that *a significant portion* of the
4 general consuming public or of targeted consumers, acting reasonably in the
5 circumstances, could be misled.” *Id.* (emphasis added).

6 The Court need look no further than the label at issue to determine, as a matter
7 of law, that “a significant portion of the general consuming public or of targeted
8 consumers, acting reasonably in the circumstances” would not be misled by the
9 “handcrafted” statement on Jim Beam’s bourbon label. *Id.*; see *Hairston v. S. Beach*
10 *Beverage Co. Inc.*, Case No. CV-1429-JFW DTBX, 2012 WL 1893818, at *4 (C.D.
11 Cal. 2012) (dismissing UCL and FAL claims after concluding as a matter of law that
12 members of the public were not likely to be deceived by the product packaging);
13 *Werbel ex rel. v. Pepsico, Inc.*, Case No. C 09-04456 SBA, 2010 WL 2673860, at *4
14 (N.D. Cal. July 2, 2010) (dismissing UCL and FAL claims with prejudice where no
15 reasonable consumer would likely be deceived by statement on product packaging).
16 A review of the label itself demonstrates that Plaintiff’s claim fails for at least five
17 distinct reasons: (1) the statement at issue appears only once, in small font on the side
18 label of the product; (2) Plaintiff’s allegations demonstrate that he read the word
19 “handcrafted” out of context; (3) the “handcrafted” statement is not a specific and
20 measurable claim; (4) common sense defies Plaintiff’s proffered interpretation of the
21 statement; and (5) the “handcrafted” statement could not have misled Plaintiff in light
22 of his own allegations that videos and photographs admittedly available on Jim
23 Beam’s own public website demonstrate the actual production process for Jim Beam’s
24 white label bourbon.

25 First, the inconspicuous location and relative miniscule size of the
26 “handcrafted” statement on the challenged label renders implausible Plaintiff’s claim
27 that he was misled by that statement—let alone his allegations that an entire class of
28 purported California consumers were misled by such statement. Despite Plaintiff’s

1 desperate attempts to enlarge and distort the size of the label’s “handcrafted”
2 statement in his Complaint (*see* ¶ 33), the truth—apparent from even a cursory review
3 of the label in its correct proportions—is that the statement appears only once, in
4 small font, on the side of the label, and in the context of a graphic depiction relating to
5 the recipe. This appears to be the first case where a plaintiff has based a labeling
6 claim on a side label, a claim that cannot be reconciled with repeated court holdings
7 that “a reasonable consumer” cannot be expected to read small print or a side label on
8 a product. *See Lam v. General Mills, Inc.*, 859 F. Supp. 2d 1097, 1104 (N.D. Cal.
9 2012) (“[A]t the pleading stage, the Court cannot conclude that a reasonable consumer
10 should be expected to ... discover the truth in the small print”); *Williams v. Gerber*
11 *Prods. Co.*, 552 F.3d 934, 939 (9th Cir. 2008) (“disagree[ing] with the district court
12 that reasonable consumers should be expected to look beyond misleading
13 representations on the front of the box to discover the truth from the ingredient list in
14 small print on the side of the box”); *Koenig v. Boulder Brands, Inc.*, 995 F. Supp. 2d
15 274, 288 (S.D.N.Y. 2014) (“[A] reasonable consumer might ... overlook the smaller
16 text that discloses the fat content”). With courts having held that a reasonable
17 consumer cannot be expected to look to the small text or side label to understand
18 ingredients, Plaintiff here cannot plausibly contend that a reasonable consumer would
19 be deceived by, and base his or her purchasing decision on, one word on the side of
20 the Jim Beam bourbon bottle. Moreover, unlike food or non-alcoholic beverage
21 manufacturers, Jim Beam is not required to list the ingredients on its label. That fact
22 underscores further that it is unlikely a reasonable consumer would look to the side
23 label of bourbon in deciding whether to purchase it.

24 Second, not only does the physical location and size of the “handcrafted”
25 statement on the label render it unlikely to mislead a reasonable consumer, the
26 juxtaposition of the sole “handcrafted” statement with other words on the label further
27 indicates that it is not likely to mislead a reasonable consumer. The “handcrafted”
28 statement does not appear in a vacuum on Jim Beam’s bourbon label; instead, it

1 appears only as part of an artistic design above the words “family recipe.” Indeed,
2 both “handcrafted” and “family recipe” are printed in the same font and are part of a
3 unified design, with a whisky barrel appearing in between the words. Plaintiff’s
4 Complaint completely ignores the location of the “handcrafted” statement next to the
5 words “family recipe” and the well-established law in California that challenged
6 claims must be considered in context. *See, e.g., Hairston*, 2012 WL 1893818, at *4;
7 *Koehler v. Litehouse, Inc.*, Case No. 12-cv-4055, 2012 WL 6217635, at *3 (N.D. Cal.
8 Dec. 13, 2012) (“To determine whether a reasonable consumer is likely to be
9 deceived, the statement must be read in context of the entire advertisement.”) (citing
10 *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995)). In *Hairston*, a plaintiff
11 challenged the “all natural” statement on a beverage label, but because the “claim
12 [was] based on a single out-of-context phrase found in one component” of the label,
13 the court concluded that “Plaintiff’s selective interpretation of individual words or
14 phrases from a product’s labeling [could not] support a CLRA, FAL, or UCL claim”
15 and granted the motion to dismiss. The court further stated that the company did not
16 use the challenged “language in a vacuum” and one statement could not suffice to
17 support the plaintiff’s claim. *Id.* Likewise, Plaintiff’s theory ignores all of the other
18 statements on the challenged label and instead presumes that reasonable consumers
19 would latch onto the single word “handcrafted” and interpret it to refer to the bourbon
20 itself, rather than the “family recipe” over which it directly appears. Plaintiff’s theory
21 is implausible and should be rejected.

22 Third, even if it is plausible that a significant portion of the consuming public
23 would see and rely on the sole “handcrafted” word on the side of Jim Beam’s label
24 and interpret it to refer to the bourbon rather than the recipe, Plaintiff has not and
25 cannot allege that the statement is likely to deceive reasonable consumers because the
26 term “handcrafted,” as used on Jim Beam’s label, is not a “specific and measurable
27 claim.” It therefore cannot mislead a reasonable consumer as a matter of law. *See Vitt*
28 *v. Apple Computer, Inc.*, 469 F. App’x 605, 607 (9th Cir. 2012) (explaining that an

1 actionable false advertisement requires “a ‘specific and measurable claim’ capable of
2 being proved false or of being reasonably interpreted as a statement of objective fact”
3 (quoting *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 731
4 (9th Cir. 1999)). Far from being a “[a] factual representation[] that a given standard
5 has been met” (*id.* at 607), “handcrafted,” particularly in the context of distilled
6 spirits, is a general, subjective term that is not subject to measurement. Plaintiff all
7 but concedes that there is no established standard for the use of the term “handcrafted”
8 in connection with the production of distilled spirits, as evidenced by his reliance on
9 the dictionary’s definition of “handcrafted”: “created by a hand process rather than a
10 machine” (*see* Compl. ¶ 70). But even that definition lacks the required quantifiable
11 specificity. For example, it fails to specify what a “hand process” is, and whether
12 such a process may include mechanized components that are directed by hand. Not
13 only is the term “handcrafted” generalized and vague, but the Jim Beam label does not
14 include numerical or other quantifiers (such as “100%” or “all”), that could arguably
15 make the representation more objective. Because the term “handcrafted” on the Jim
16 Beam label is not a “specific and measurable claim,” it cannot reasonably be
17 interpreted in the manner Plaintiff alleges. *See Vitt*, 469 F. App’x at 607.

18 Fourth, even if the “handcrafted” statement is specific and measurable,
19 Plaintiff’s theory that he (and an entire purported class of California consumers)
20 would understand from the word “handcrafted” on Jim Beam’s label that the bourbon
21 was made entirely by hand defies the common sense standard applied by the Ninth
22 Circuit. Specifically, the Ninth Circuit has affirmed dismissal of UCL claims at the
23 pleading stage where the plaintiff’s theory “def[ied] common sense” and “strained
24 credulity.” *See Stuart v. Cadbury Adams USA, LLC*, 458 F. App’x 689, 690 (9th Cir.
25 2011) (affirming dismissal of plaintiff’s claim that Trident White gum “removes
26 stains” was misleading); *Carrea v. Dreyer’s Grand Ice Cream, Inc.*, 475 F. App’x
27 113, 115 (9th Cir. 2012) (affirming dismissal of UCL claim because “it strains
28 credulity” to argue that a reasonable consumer would be misled to think that ice cream

1 with “chocolate coating topped with nuts” is healthier than competing brands); *see*
2 *also Williamson v. Apple, Inc.*, Case No. 5:11-cv-00377 EJD, 2012 WL 3835104, at
3 *1, 6 (N.D. Cal. Sept. 4, 2012) (dismissing UCL claim of plaintiff with a shattered
4 iPhone who challenged Apple’s statement that the glass it uses for the phones is
5 “comparable in strength to sapphire crystal” because “it is a well-known fact of life
6 that glass can break under impact” and it would require “a suspension of logic” to
7 think otherwise); *Stearns v. Select Comfort Retail Corp.*, Case No. 08-2746 JF, 2009
8 WL 1635931, at *11 (N.D. Cal. June 5, 2009) (intentional misrepresentation claim
9 dismissed based on statement that beds would be “maintenance free” and that a
10 purchaser would receive “constant and wear free support night after night” because
11 “no product is ever maintenance-free” and “no consumer reasonably could have that
12 expectation.”).

13 A common-sense, reasonable interpretation of the word “handcrafted” cannot
14 be that Jim Beam employees break up the grain with their hands, stir the mixture by
15 hand, distill and ferment the alcohol without the use of any machinery, make the glass
16 bottles by hand, fill each bottle by hand, and handwrite each label on each bottle. The
17 word “handcrafted” cannot reasonably be interpreted to mean, as Plaintiff would have
18 this Court believe, that every step of the Jim Beam bourbon production process must
19 be accomplished solely by hand. Instead, as Plaintiff points out in his Complaint, Jim
20 Beam’s bourbon is a distilled spirit (a *consumable* good) sold throughout the United
21 States. Of course, Jim Beam bourbon must be prepared in compliance with health and
22 safety regulations and in a clean and sanitary manner. Not even the least sophisticated
23 consumer of bourbon—and certainly not a reasonable consumer—would understand
24 that this consumed drink, made from combining various ingredients together in
25 different ways, would be literally and entirely made with human hands. *See Lavie*,
26 105 Cal. App. 4th at 510 (the “likely to deceive” standard is an objective one based on
27 the reasonable consumer, not an “exceptionally acute” consumer, nor the “least
28 sophisticated consumer”). Accordingly, because a reasonable consumer could not be

1 misled, the Court should dismiss Plaintiff's claims.

2 Finally, the "handcrafted" representation could not have misled Plaintiff
3 because, as Plaintiff highlights in his Complaint, videos and photographs admittedly
4 available on Jim Beam's own public website demonstrate the actual production
5 process for Jim Beam's bourbon. *See* Compl. ¶¶ 15-16, 19, 38-39.³ A statement
6 cannot be misleading where the advertiser expressly discloses to the buying public the
7 objective facts underlying that statement. *See, e.g., Porras v. StubHub, Inc.*, Case No.
8 C 12-1225 MMC, 2012 WL 3835073, at *6 (N.D. Cal. Sept. 4, 2012); *Manchouck v.*
9 *Mondelez Int'l Inc.*, 2013 WL 5400285, at *3 (N.D. Cal. Sept. 26, 2013) (dismissal of
10 claim premised on statement that cookies were "made with real fruit" where "the list
11 of ingredients on the packaging serves notice to consumers that the products contain
12 'Raspberry Purée' and 'Strawberry Purée' respectively"); *Thomas v. Costco*
13 *Wholesale Corp.*, Case No. 5:12-CV-02908 EJD, 2013 WL 1435292, at *5 (N.D. Cal.
14 Apr. 9, 2013) ("no trans fat" claim on label was non-actionable where it was "clearly
15 stated on the labeling of the product [plaintiff] purchased"). Plaintiff cannot plausibly
16 contend Jim Beam misleads anyone about the nature of the process for producing its
17 bourbon when Plaintiff also alleges that Jim Beam's own public materials contain the
18 various videos and photos showing the "true" process for making the bourbon.
19 Accordingly, Plaintiff fails to state a claim and his Complaint must be dismissed.

20 **2. Plaintiff Cannot State a Claim For Intentional** 21 **Misrepresentation**

22 To state a claim for intentional misrepresentation under California law, a
23

24 ³ This Court may consider Jim Beam's website in ruling on a Rule 12(b)(6) motion to
25 dismiss, given Plaintiff's extensive reliance on the website in their Complaint. *See*
26 *Daniels-Hack v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (explaining that
27 courts may consider documents incorporated into a complaint by reference on a Rule
28 12(b)(6) motion to dismiss); *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005)
(courts have the authority to consider a document in ruling on a Rule 12(b)(6) motion
to dismiss even if the plaintiff does not physically attach the document if the
plaintiff's complaint necessarily relies upon it and no party disputes its authenticity).
Plaintiff does not dispute the website's authenticity, and indeed he relies on the
website extensively throughout his Complaint. (*See* Compl. ¶¶ 15-16, 19, 37-63.)

1 plaintiff must plead seven elements with particularity: (1) the defendant represented to
2 the plaintiff that an important fact was true; (2) that representation was false; (3) the
3 defendant knew that the representation was false when the defendant made it, or the
4 defendant made the representation recklessly and without regard for the truth; (4) the
5 defendant intended that the plaintiff rely on the representation; (5) the plaintiff
6 reasonably relied on the representation; (6) the plaintiff was harmed; and (7) the
7 plaintiff's reliance on the representation was a substantial factor in causing that harm
8 to the plaintiff. *Manderville v. PCG & S Group, Inc.*, 146 Cal. App. 4th 1486, 1498
9 (2007). Here, Plaintiff's intentional misrepresentation claim fails for two reasons.
10 First, as set forth above, Plaintiff has not and cannot plead that the challenged
11 statement would mislead a reasonable consumer such that the consumer could have
12 reasonably relied on it. Thus, that statement cannot form the basis of an intentional
13 misrepresentation (i.e., fraud) claim. *See Stuart*, 458 F. App'x at 691-92 (fraud claim
14 dismissed because challenged statement could not, as a matter of law, have misled a
15 reasonable person).

16 Second, Plaintiff has not—and cannot—allege that Jim Beam acted with the
17 requisite fraudulent intent to deceive in light of Plaintiff's own allegations concerning
18 Jim Beam's production process, which it fully disclosed on its own website. In other
19 words, Plaintiff alleges that Jim Beam itself publicly disclosed the "truth" about its
20 distilling and bottling process on its website—which is completely inconsistent with
21 the conclusory allegations that Jim Beam intended to defraud. *Compare, e.g.*, Compl.
22 ¶¶ 15-16, 19 (allegations describing Jim Beam's website, photos, and video footage)
23 with Compl. ¶ 120 (alleging Jim Beam "knew that their bourbon was not
24 'handcrafted,' but nevertheless made representations that it was, with the intention
25 that consumer rely on their representations"). If Jim Beam intended to defraud
26 consumers by use of the "handcrafted" statement on its white label bourbon bottle, it
27 certainly would not publicly post what Plaintiff describes as accurate depictions of the
28 Jim Beam production process. Jim Beam's public disclosure of its production process

1 is entirely inconsistent with any fraudulent intent, and Plaintiff's specific allegations
2 on that score trump his conclusory allegations of intent. *See Chem. Device Corp. v.*
3 *Am. Cyanamid Co.*, Case No. C-89-1739 WHO, 1990 WL 56164, at *3 (N.D. Cal.
4 Jan. 11, 1990) ("the court is not bound to accept conclusory legal allegations in the
5 complaint when more specific allegations in the pleadings are at variance with those
6 conclusions") (citation omitted); *see also Sprewell v. Golden State Warriors*, 266 F.3d
7 979, 988-89 (9th Cir. 2001) (affirming dismissal of the plaintiff's claim, explaining
8 that a plaintiff can plead himself out of a claim by including in his complaint and
9 exhibits thereto detail contrary to his claims); *see also Steckman v. Hart Brewing, Inc.*,
10 143 F.3d 1293, 1295-96 (9th Cir. 1998) ("[W]e are not required to accept as true
11 conclusory allegations which are contradicted by documents referred to in the
12 complaint."). Plaintiff's intentional misrepresentation claim should be dismissed
13 accordingly.

14 3. The Economic Loss Doctrine Bars Plaintiff's Negligent 15 Misrepresentation Claims

16 As Plaintiff's counsel recently conceded in a false advertising case their clients
17 brought against another bourbon producer in this District,⁴ negligent
18 misrepresentation claims based solely on economic injury – like that asserted here –
19 fail under California's well-established economic loss doctrine. Under California law,
20 "[i]n the absence of (1) personal injury, (2) physical damage to property, (3) a 'special
21 relationship' existing between the parties, or (4) some other common law exception to
22 the rule, recovery of purely economic loss is foreclosed." *Kalitta Air, LLC v. Cent.*
23 *Tex. Airborne Sys., Inc.*, 315 F. App'x 603, 605 (9th Cir. 2008) (quoting *J'Aire Corp.*
24 *v. Gregory*, 24 Cal. 3d 799, 804 (Cal. 1979). Plaintiff does not allege personal injury
25 or property damage, only that he would not have purchased the product or would have
26 paid less for the product absent the "handcrafted" statement. Compl. ¶ 112. Courts

27 ⁴ *See Nowrouzi v. Maker's Mark Distillery Inc.*, No. 3:14-CV-02885-JAH-NLS (S.D.
28 Cal.), Dkt. 10, Plaintiff's Memorandum of Points and Authorities in Opposition to
Defendant's Motion to Dismiss at 18.

1 have routinely held that the economic loss doctrine bars negligent misrepresentation
2 claims based on economic injury in consumer class actions. *See, e.g., Minkler v.*
3 *Apple, Inc.*, No. 5:13-CV-05332-EJD, 2014 WL 4100613, at *6 (N.D. Cal. Aug. 20,
4 2014) (negligent misrepresentation claim dismissed pursuant to the “economic loss”
5 rule, where plaintiff alleged she would not have purchased the iPhone 5 had she
6 known of an alleged Apple Maps defect); *Ladore v. Sony Computer Entm’t Am., LLC*,
7 No. C-14-3530 EMC, 2014 WL 7187159, at *8-9 (N.D. Cal. Dec. 16, 2014)
8 (negligent misrepresentation claim dismissed pursuant to the “economic loss” rule
9 where plaintiff alleged only economic damages as a result of his purchase of allegedly
10 defective Sony product); *Vavak v. Abbott Labs., Inc.*, No. SACV 10-1995 JVS,
11 2011 WL 10550065, at *4-6 (C.D. Cal. June 17, 2011) (negligent misrepresentation
12 claims based solely on money damages incurred from the purchase price barred by the
13 “economic loss” rule where purchaser alleged that she would not have paid for
14 allegedly defective baby formula). As Plaintiff has not and cannot establish the
15 required injury to avoid the economic loss doctrine, his negligent misrepresentation
16 claim should be dismissed as a matter of law.

17 **V. CONCLUSION**

18 For the foregoing reasons, Jim Beam respectfully requests that the Court
19 dismiss Plaintiff’s Complaint with prejudice as set forth herein.

20 Dated: March 18, 2015

WINSTON & STRAWN LLP

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22
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24 Attorneys for Defendant
JIM BEAM BRANDS CO.
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